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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 625

In the Matter of

The Petition of HANS-OLA T. MALMSTEDT for the Adoption of a Minor

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

Joint Brief in Opposition for Respondent Mother and Church Mission of Help of the Diocese of Maryland, Inc.

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (R. 6-14) is reported at 243 Md. 92, 220 A.2d 147 (1966). As a practical matter, the 'opinion' of the Circuit Court for Montgomery County embraces three separate documents, namely: a) Decree filed September 22, 1965 [redacted]

(E 96-97),[1] b) Decision filed October 20, 1965 (Resp. App. 3a-5a),[2] and c) Memorandum Opinion and Order also filed October 20, 1965 (E 97-101).[3] None of said documents are reported either officially or unofficially.

QUESTION PRESENTED

Whether any of Petitioner's constitutionally-protected rights were violated by a state court's denial of his petition for adoption of his own illegitimate child born out of wedlock on the grounds that such adoption would be contrary to the best interests of the child.

STATEMENT

The facts in this case can be stated quite simply. A childhood friendship between Petitioner and Respondent Mother (E 30) culminated in pregnancy during her freshman year at college (E 31). Before her child was born, Respondent Mother had made up her mind not to marry the Petitioner (E 91). Acting in accordance with her convictions regarding her child's best interests (E 90-91), she made arrangements to place her child with the Church Mission for adoption (E 89).

The Church Mission is an agency of the Protestant Episcopal Church of the Diocese of Maryland. It is a social casework agency that works primarily with young people (E 16, 80); it is licensed by the State of Maryland as a child placement agency (E 32); and, it makes no charge for its services (E 85). The Church Mission intervened in the present proceedings (E 8, 11-13) because the Re-

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[1] It was from this Decree that Petitioner entered his appeal to the Court of Appeals of Maryland on October 8, 1965 (E 101). Said Decree is not appended to the Petition filed herein.

[2] Said Decision is not appended to the Petition.

[3] Said Memorandum Opinion is appended to the Petition as Appendix C (Pet. App. A-7 to A-11).

spondent Mother's child had been in its physical care and custody ever since she was three days old (E 29-30).

On March 2, 1965, the Petitioner filed a petition (E 3-4) under Article 16, § 70 (Pet. App. A-14),[4] seeking to adopt his illegitimate child born January 25, 1965. The Petitioner admitted paternity (E 3, 43), and the trial court's finding that "the minor child is the daughter of the [Petitioner] and the [Respondent Mother]" is undisputed (E 96). Neither of the natural parents are now married, nor have either of them ever been married.

The petition for adoption filed by Petitioner was not accompanied by the Respondent Mother's consent (E 96, 97), as *conditionally* required by Maryland statute.[5] After trial, a Decree was entered by Judge Thomas M. Anderson denying the petition [redacted] (E 96) which included the following finding:

> "5. That the consent of the [Respondent Mother] was not withheld contrary to the best interests of the child."

As a result of said finding, and solely as a result thereof, the petition for adoption could not have been granted without the Respondent Mother's consent.

There was abundant evidence to support Judge Anderson's finding of fact, concurred in by the Court of Appeals of Maryland (243 Md. at 96-97, 220 A.2d at 150), that the Respondent Mother's consent was not withheld contrary to the best interests of the child. The Petitioner is twenty-three years old and unmarried (E 3, 23). He is financially dependent on his parents (E 3-4, 47, 49-50). He is the only child (E 23) of a "dominant" mother (E 24, 35) who repeatedly referred to Respondent Mother's child as her

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[4] Unless otherwise stated, all citations herein to the Maryland statutes refer to the Annotated Code of Maryland, 1957 Edition.

[5] Article 16, §§ 74, 74(d) (1965 Cum. Supp.).

"grandchild" (E 74, 78). Since first entering college in 1961, he has withdrawn twice and completed only three semesters (E 47, 48). After dropping out of college for the second time in 1963, he received psychiatric counselling and was later classified as 1-Y ("not eligible for service") by the Selective Service (E 48). He has never been regularly employed for more than a few months at a time (E 25). Having no separate residence of his own, he proposed to place the child in the physical care and custody of his parents for approximately two years (E 3, 41, 51, 75) while he was completing his college education (E 43, 51). He would have to commute 190 miles round-trip to visit the child on week-ends and vacations (E 45). Finally, and of paramount importance, the investigation report filed herein by the Maryland Department of Parole and Probation (E 23) did not recommend granting the petition for adoption (E 38-39).[6]

The Petitioner presented two expert witnesses, Dr. Allan S. Berger (E 54) and Mrs. Francis P. Simsarian (E 66). Dr. Berger's opinions were based on two brief appointments with the Petitioner (E 65). Mrs. Simsarian had never met the Petitioner or his mother until the night before the hearing. Judge Anderson disregarded the testimony of both witnesses in his Memorandum Opinion (Pet. App. A-7; E-97), and the Maryland Court of Appeals found their opinions to be unhelpful (243 Md. at 95-96, 220 A.2d at 149).

The Respondent Mother testified herself (E 88, 91) but did not call any witnesses on her behalf. The Church Mission presented one expert witness, Mrs. J. Carroll (Dorothy C.) Johns (E 80). Mrs. Johns has been associated with the Church Mission for 34 years and is now its Executive Director (E 16, 80). She has recently retired as chairman of the Maryland Department of Public Welfare's Advisory

[6] The preparation of an investigation report was required by court Order (E 13-14).

Committee on Adoption (E 18, 81). Mrs. Johns testified as follows: That, in her experience, placing children for adoption with an unmarried man was "[u]nheard of" (E 19, 21, 84); that the Church Mission would return the child to Respondent Mother at any time upon demand (E 21, 99); that the most advantageous time to complete the arrangements for the placement of a child is between the ages of 2½ and 3½ months (E 21); and, that a petition for guardianship with the right to consent to adoption[7] was prepared and forwarded to Respondent Mother for signature in March, 1965, when the child was two months old (E 21-22, 83), but that said petition was never signed because of the uncertainties raised by the filing of Petitioner's petition for adoption on March 2, 1965 (E 22, 83; see also, E 89-90, 95).

Today this 21-month-old child is still in foster care placement under the auspices of the Church Mission.

ARGUMENT

I. This Court Lacks Jurisdiction

Respondents respectfully point out to the Court that it lacks jurisdiction over this case because Petitioner has raised his alleged "constitutional" issues for the first time in this Court. At no time before the Circuit Court for Montgomery County or in the Maryland Court of Appeals did Petitioner cite or rely upon the Fourteenth Amendment, nor did he raise the due process and equal protection questions posed in his Petition. Neither court below passed upon such questions. Both courts relied entirely upon non-federal grounds for their decisions. Under such circumstances, this Court has no jurisdiction over the case.[8]

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[7] Article 16, § 72 (1965 Cum. Supp.).

[8] 28 U.S.C. § 1257(3); Supreme Court Rule 19(1)(a); Stern and Gressman, *Supreme Court Practice* (3d Ed., 1962), § 3-25. It may also be noted that the Petition fails to specify how, when or where a federal question was raised in the Maryland courts, as required by Supreme Court Rule 23(1)(f).

II. The Maryland Courts Correctly Applied the Statutory Standard Governing Adoption Proceedings

The sole issue in the trial court was whether it would have been in the best interests of the Respondent Mother's child to have permitted her adoption by Petitioner—a question of family law peculiarly within the competence of the Maryland courts. Supervision over the adoption of illegitimate children is a routine matter for the state courts acting under state statutes. The standard universally applied in all adoption proceedings is 'the best interests of the child'.

In this case, the 'best interests of the child' standard appears in Article 16, § 74 of the Maryland adoption law, which provides in pertinent part as follows:

> "Every petition for adoption shall be accompanied by written statements of consent * * *. However, the court may grant a petition for adoption without any of the consents hereinafter specified, if, after a hearing the court finds that such consent or consents are withheld contrary to the best interests of the child.
>
> "Consent to any proposed adoption shall be obtained from:
>
> * * *
>
> "(d) The mother of a child born out of wedlock * * *.
>
> * * *"

The opinions by the Courts below make it abundantly clear that the statutory standard controlled their decisions. In his Memorandum Opinion and Order, Judge Anderson followed the statute explicitly, stating (Pet. App. A-9, A-10; E 99):

> "As in custody cases the welfare and best interests of the child are the primary considerations in all adoption proceedings. Walker v. Gardner, 221 Md. 280, 157 A (2d.) 273. The test as to what is the 'best interests' of the adoptive child necessarily depends on the facts and circumstances in each case. Shetler v. Fink, 231 Md. 302, 190 A (2d.) 76.

> "In the Court's opinion it is manifestly in the welfare and best interest of the child that the petition for adoption should be denied. * * *"

Similarly, the Maryland Court of Appeals prefaced its consideration of the record by restating the statutory standard as follows (243 Md. at 93, 220 A.2d at 148):

> "In adoption proceedings relative to minors, the primary matter for consideration by the courts is still the best interest of the minor."

After applying the statutory standard to the record (including all of the evidence bearing on Petitioner's "fitness", *supra*, pp. 3-4), the Court concluded (243 Md. at 96-97, 220 A.2d at 150):

> "It is obvious to us that the facts impelled [Judge Anderson's] holding; consequently, we not only find no reason to disturb his ruling, but state that had it been otherwise, we would have had to change it."

Since the Respondent Mother withheld her consent, the duty of the court under the Maryland adoption statute was to determine wherein lay "the best interests of the child." That is what both courts below said the issue was, and what they said they were deciding (Pet. App. A-2, A-10). That is what they did decide—namely, that for many reasons it was not in the best interests of this particular child to be adopted by this particular Petitioner under the particular circumstances reflected by this record.

III. The Issues Which Petitioner Attempts To Raise Are Not Involved in the Case

Throughout his argument, Petitioner assumes that the Circuit Court for Montgomery County and the Maryland Court of Appeals decided this case on the ground that a father of an illegitimate child is automatically ineligible to adopt his child.[9] Quite the opposite is true. The opinions

[9] *E.g.*, see pages 12-14, 21, 27, 28 and 30 of the Petition.

below make clear that *if* the best interests of this child would be served by allowing Petitioner to adopt her, the petition for adoption would have been granted. But the Maryland courts found otherwise. In so doing, both courts below precisely and specifically followed the language of Maryland's adoption statute, *supra,* p. 6, which Petitioner does *not* attack as unconstitutional (Pet. 12, 14, 17, 19).[10]

Petitioner's charge of "state interference in the relationship between a father and his child" (Pet. 21) is analagous to a charge in a divorce case that awarding custody of a child to one parent is an interference with the relationship between the child and the other parent. Obviously, when the custody or adoption of a child is put in issue, through whatever circumstances, the state has a right and a duty to intervene.

And, finally, if Petitioner is arguing, as he seems to be at pages 21-27 of his Petition, that he has a statutory right to custody of the child as long as he is a "fit" person, regardless of the child's best interests, the simple and complete answer is that the Maryland adoption statute provides otherwise.

CONCLUSION

For each and all of the reasons cited above, the Petition should be denied. In addition, Respondents wish to point out that there is no national policy reason for the Court to decide this case, even if the questions presented by Petitioner were properly before the Court. Petitioner himself has admitted that this is an exceptional case, not likely to arise again; in fact, he can only find three state court cases even indirectly in point in the entire history of American jurisprudence (Pet. 10, 25).

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[10] Moreover, if Petitioner's attack had been on the constitutionality of Maryland's statute, his relief in this Court would be by way of appeal rather than certiorari. Stern and Gressman, *Supreme Court Practice* (3d Ed., 1962), § 3-4.

Respondents respectfully urge the Court to deny the Petition promptly so that the child involved here can be placed in a loving home with adopting parents at the earliest practical date.

Respectfully submitted,

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